Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 85-1395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL STEEL CORPORATION,

Petitioner,

v

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

On Petition for Writ of Certiorari from the Supreme Court of Appeals of West Virginia

REPLY BRIEF OF PETITIONER NATIONAL STEEL CORPORATION

T. D. KAUFFELT
KAUFFELT & KAUFFELT
803 Kanawha Valley Building
Post Office Box 3082
Charleston, West Virginia 25331
(304) 345-1272

Attorney for Petitioner

Page

TABLE OF CONTENTS

Reply to Brief in Opposition 1

Conclusion 7

TABLE OF CITATIONS

CASES: Page

Public Service Company of New Hampshire v. *Federal Energy Regulatory Commission*, 600 F.2d 944 (D.C. Cir. 1978) 5

State of North Carolina ex rel. Utilities Commission v. *CF Industries, Inc.*, 263 S.E.2d 559 (1980) 5

Transcontinental Gas Pipe Line Corporation, 32 FERC §61,230 (1985) 7

STATUTES:

W.Va. Code §24-1-1 (a) (4) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1395

NATIONAL STEEL CORPORATION,

Petitioner,

v

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

On Petition for Writ of Certiorari from the Supreme Court of Appeals of West Virginia

REPLY BRIEF OF PETITIONER NATIONAL STEEL CORPORATION

Reply to Brief in Opposition

Respondent Public Service Commission of West Virginia provides this Court with two reasons for denying the writ of certiorari. Petitioner National Steel Corporation wishes to briefly respond to both of these reasons.

Respondent contends that its actions in the case below were consistent with the intent and prior application of

Rule 30-C. Respondent's omissions in this argument speak most loudly to its weakness. Respondent, while discussing the Rule 30-C and its purpose, cites only one portion of the Rule, the preamble, to justify the direct billing in the case below. The preamble provides that the Public Service Commission may "interpret" the Rule to prevent "undue hardship for a utility or its customers." Respondent fails to cite that portion of Rule 30-C which can be "interpreted" so as to support the direct billing of Petitioner National Steel Corporation. This omission is due to the fact that the Rule clearly provides for past underrecoveries of gas costs to be rolled into future gas rates. Respondent can find no section of Rule 30-C which would even remotely support its present position, clearly demonstrating that, in the case below, Rule 30-C was abandoned.

Respondent cites two cases in which minor unrelated calculation adjustments were made in prior Rule 30-C proceedings, claiming its position in the case below was the next logical step. Respondent does not explain how these minor calculation adjustments led to direct billing or how these calculations caused any conflict with the language of Rule 30-C, requiring interpretation. Petitioner submits that they did not. The clearest point to be raised by this portion of Respondent's brief is that Respondent cannot cite one case in which it has interpreted Rule 30-C to permit the direct billing of customers for prior underrecoveries of gas costs. This omission is a result of Respondent's unprecedented action in the case below

Another omission which demonstrates the fallacies in Respondent's argument is Respondent's inability to cite the language in its Orders which justify its new "inter-

pretation" of Rule 30-C. A finding that the utility or its customers were about to suffer "undue hardship" is required by Rule 30-C's preamble. No such finding was made. Respondent, until judicial review began, was not attempting to "interpret" Rule 30-C; rather, Respondent abandoned the Rule completely and ordered direct billing. Respondent admitted as much by calling its action a "case-specific modification" of Rule 30-C.

Respondent states that Petitioner was a "customer that knows not only what a Rule 30-C proceeding entails, but also that every gas utility company in West Virginia makes such a filing annually." (p. 11) Yet given the frequency of these filings, and the numerous gas utilities in West Virginia, Respondent is unable to provide this Court with one example of Rule 30-C being "interpreted" in a manner similar to the case below. Respondent is correct that Petitioner was a customer that knows what a Rule 30-C proceeding entails. That is the very reason for the petition for a writ of certiorari.

Respondent claims that Petitioner was not denied due process because hearings were held. Respondent does not address the central question raised by Petitioner. Respondent fails to explain how due process could have been provided when administrative rules were ignored, unprecedented direct billing was authorized, and no prior notice of the possibility of such action was given. Respondent fails to explain how due process was provided when it acted far beyond the scope of the public notice provided and its own Rule 30-C.

Respondent states that Petitioner "cannot truthfully claim that it was 'surprised'." (p.12) Petitioner resents the implications of the statement and would assert that

it is always surprised when an administraitve body flagrantly ignores its own administrative rules, when it ignores all legal precedent against retroactive ratemaking, and when it acts far beyond the scope of the notice which it provided to the public. More to the point, Respondent attempts to demonstrate the advance warning that Petitioner had, but can point to only vague hints and general concerns for past underrecoveries. Respondent provides no citation or attachment which "clearly presented" the direct billing concept. Interestingly, Respondent attempts to stretch the time in which it feels that Petitioner had notice by dating the time of notice from Respondent's Final Order. This was entered more than nine months after the final hearing.

Respondent also disputes that a conflict for counsel for Petitioner resulted from this retroactive ratemaking. Respondent does not explain how conflict on this issue could not have arisen between a present customer who would not obtain great advantage from direct billing and a past customer who would obtain great disadvantage. Respondent's curious injection of the May 11, 1983 date (p.13) has Petitioner stumped as to how this date has any bearing in the present case.

Respondent's second reason for denial is that it was not engaged in retroactive ratemaking. Petitioner, in its petition, demonstrated that retroactive ratemaking had occurred in order to show this Court how all legal precedent was abandoned, without notice, in the case below.

Respondent asserts, incredibly, that the direct billing is not recovery for past losses. Rather "the underrecoveries were nothing more than costs Columbia had incurred directly for the benefit of the Petitioner and other large

volume users." (p. 14) Petitioner is at a loss to understand the difference. Respondent admits that the costs used to calculate underrecoveries and set the direct billing are "related to actual gas consumption." (p. 14) Cost incurred in the past, related to actual gas consumption and then billed cannot be anything but retroactive ratemaking.

Respondent's attempt to call the PGA an estimated rate ignores the clear language of Rule 30-C which rolls all underrecoveries into future rates. Respondent then cites *Public Service Company of New Hampshire* v. *Federal Energy Regulatory Commission,* 600 F.2d 944 (D.C. Cir. 1978) to support its position that it is not engaged in retroactive ratemaking. A reading of that case, however, supports the exact opposite. In the above cited case, the Court stated that the use of cost-of-service tariffs with deferred billings was not retroactive ratemaking. Respondent, in its orders, administrative rules, or even in its brief in opposition, has never contended that Mountaineer Gas Company's tariff is a cost-of-service tariff with deferred billings. Mountaineer's tariff, like the tariff for every other utility in West Virginia, is a fixed tariff, where past costs are used to approximate actual current costs. The Court in *Public Service Company of New Hampshire, supra,* found that a proposed surcharge with this kind of tariff was retroactive ratemaking.

Respondent also cites *State of North Carolina ex rel. Utilities Commission* v. *CF Industries, Inc.,* 263 S.E.2d 559 (1980) for support. This case merely states that past underrecoveries can be rolled into past overrecoveries to calculate refunds. The Court never states that direct billing for past underrecoveries is proper and is not retro-

active ratemaking. It speaks to the calculation of refunds and not the billing of past customers.

Respondent clouds the issues presented by discussing prior overrecoveries without fully explaining the nature of a Rule 30-C proceeding. A utility engages in Rule 30-C proceedings on a voluntary basis. Instead of waiting for a full rate case to recover purchased gas costs, Respondent agrees to let a utility determine those particular costs on a yearly basis and adjust future rates accordingly. In return for this administrative proceeding which results in faster and easier cost recovery, the utility agrees to refund any past overrecoveries to its customers. This agreement prevents the utility from complaining about retroactive ratemaking and is the price of receiving the benefit of Rule 30-C. Petitioner, and other utility customers, receive no such benefit and have made no such agreement and, therefore, can justly object to retroactive ratemaking.

Respondent states that *W.Va. Code* §24-1-1(a)(4) requires its action in the case below. Respondent does not explain why Respondent has not modified Rule 30-C in a formal proceeding to meet this longstanding statutory language or why Respondent has not interpreted Rule 30-C in subsequent Rule 30-C proceedings as it did below. Respondent has felt this statutory constraint only once, in the case below. In actuality, no such statutory requirement exists, and Respondent is fully aware of it.

Petitioner wishes to directly address the footnote on page 16, which contends that abandonment by Petitioner of the gas system would result in a large rate increase to existing large volume customers. This position is unsupported in the record and is absurd. Petitioner did not

abandon the gas system by shutting down a plant or taking a plant off the system. Petitioner sold its facilities and they continue to be operated by the Weirton Steel Corporation. There is no evidence that the gas usage pattern of the facilities was altered by Petitioner's sale. Respondent's claim that Petitioner abandoned the gas system and affected gas costs makes no sense.

It is ironic that Respondent should cite *Transcontinental Gas Pipe Line Corporation*, 32 FERC §61,230 (1985). Petitioner is not arguing that retroactive ratemaking was a denial of due process, but that the manner in which the retroactive ratemaking was implemented was improper and denied Petitioner due process. One of the clearest examples of this impropriety is Respondent's failure to provide public notice of its intention to engage in retroactive ratemaking. In *Transcontinental*, Respondent has provided this Court with a perfect example of how the public notice should have been issued in the case below. The FERC notice in FERC Docket No. RP85-148-000 (Federal Register, Vol. 50, No. 105, Friday, May 31, 1985, pp. 23183-23184) plainly states the nature of the proceeding and the possibility of direct bills to customers. The terms "retroactive" and "direct billing" are contained at five different points in the FERC notice. The notice required by Respondent in the case below, when compared to this FERC notice, is obviously inadequate to meet basic due process requirements.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari from the Supreme Court of Appeals of West Virginia, for the

reasons cited herein and in the Petition for Writ of Certiorari.

T. D. KAUFFELT
KAUFFELT & KAUFFELT
803 Kanawha Valley Building
Post Office Box 3082
Charleston, West Virginia 25331
(304) 345-1272

Attorney for Petitioner